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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. SALVADOR A. MONCADA, Defendant and Appellant.	B208096 (Los Angeles County Super. Ct. No. BA328026)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rand S. Rubin, Judge. Affirmed.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Roberta L. Davis and Tita Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Salvador Moncada was convicted of attempted murder, attempted second degree robbery, and assault with a deadly weapon, with true findings on personal use of a weapon allegation. He appeals, claiming instructional error, ineffective assistance of counsel, and prosecutorial misconduct. We find no error and affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

Shortly after 7:00 a.m. on August 26, 2007, Jammie Orlinski was walking toward a dumpster at Yucca and Wilcox, as part of his recycling routine. According to Orlinski, appellant was on the sidewalk, "standing right in his way." He asked appellant to get out of his way, and appellant replied, "You don't know who you're messing with." The two men got into an argument. Orlinski realized his tone was loud, and felt that he was out of line, so he apologized to appellant, walked around him and went on his way.

Orlinski returned a few minutes later. As he walked down Yucca, he saw appellant across the street, coming around the corner. Appellant saw Orlinski. Appellant ran across the street, dropped his backpack, and charged at Orlinski with his hands up, saying, "You don't know who you're messing with."

When appellant reached Orlinski, he swung at him, but missed. Orlinski turned around and hit appellant on the shoulder. Appellant grabbed Orlinski around the waist and tried to tackle him, but Orlinski dragged him down to the ground. Appellant landed face first on the sidewalk, and was bleeding around the lips. Orlinski turned and began walking away.

Orlinski turned around because appellant was yelling. He saw appellant reach into his backpack and take out a knife. Appellant came toward Orlinski and said, "Give me your money." Orlinski replied, "I'm homeless. I got no money." Appellant hit Orlinski a couple of times, and then stabbed him in the chest, below the rib cage. Orlinski saw blood, and also saw "intestines or whatever . . . starting to ooze out." Orlinski stumbled away toward a liquor store. He was later taken to the hospital where he had surgery for the knife wound.

Appellant walked away, but was pursued by Geoff Hubler and Sean Mead, who had witnessed portions of the incident. Hubler called 911, and Mead knocked appellant to the ground and sat on him until the police arrived.

Appellant was arrested and charged with attempted murder, attempted second degree robbery, and assault with a deadly weapon. At trial, he testified to a different version of events, in which Orlinski was the aggressor. He denied asking Orlinski for money. The jury convicted appellant of all charges. This is a timely appeal from the judgment of conviction.

DISCUSSION

I

Appellant claims the court erred in not instructing the jury, sua sponte, on sudden quarrel as a basis for the lesser included offense of attempted voluntary manslaughter. "[A] trial court must instruct on lesser included offenses, even in the absence of a request, whenever there is substantial evidence raising a question as to whether all of the elements of the charged offense are present." (*People v. Lewis* (2001) 25 Cal.4th 610, 645.) Voluntary manslaughter is a lesser included offense of murder. (*Ibid.*) Attempted voluntary manslaughter is thus a lesser included offense of attempted murder.

The trial court recognized this, and asked defense counsel whether she wanted the jury instructed on attempted voluntary manslaughter based on heat of passion, imperfect self-defense, or both. Defense counsel expressly asked the court not to give the heat of passion instruction. The doctrine of invited error bars a defendant from claiming instructional error when the defendant made a conscious and deliberate tactical choice to request the instruction. (*People v. Harris* (2008) 43 Cal.4th 1269, 1293.) The same principle obviously applies when a defendant asks that the court *not* give a particular instruction. (*People v. Horning* (2004) 34 Cal.4th 871, 905.)

The request in this instance was clearly tactical. The defense theory was that Orlinski was loud, threatening, aggressive and out of control, and that appellant, who was shorter and weighed less than Orlinski, acted out of fear for his own safety. Appellant

testified that in the first encounter, Orlinski bumped into him, shoulder to shoulder, telling him to get out of the way. Appellant told the victim to relax, but Orlinski answered in a very loud, frustrated voice that "This is my street." Appellant again told Orlinski to relax, that he did not want any trouble. Appellant testified that he felt threatened from this encounter because Orlinski "was very mad and he was picking on me, basically, trying to take his anger towards me. And I even told him to leave me the fuck alone. And when I told him that, he kept—he kept more violence to me. He was being more violence [*sic*]." After that encounter, appellant continued to walk in the same direction as before, toward his job.

According to appellant, he saw Orlinski a second time about five minutes later. Orlinski was about 40 feet away, and was carrying a plastic bag. Appellant later discovered the bag contained empty glass bottles and cans. Orlinski ran at appellant, screaming "like a beast." Appellant put his hands out and walked toward Orlinski, telling him to calm down. Orlinski swung the bag at appellant, who ducked out of the way. Appellant grabbed Orlinski by the waist, and Orlinski threw appellant to the ground.

Appellant testified that he was afraid because Orlinski was taller than him, and angry. As appellant got up from the ground, he saw that Orlinski had a knife in his hand. Appellant grabbed Orlinski's hand and took the knife from him. He swung the knife and told Orlinski to back off, but Orlinski hit him four or five times. Appellant swung the knife just to keep Orlinski away. Appellant did not realize he had stabbed Orlinski; he just believed Orlinski had stopped fighting with him. At that point, appellant walked away.

During this altercation, appellant said he felt "afraid" and "paranoid." He explained that he did not want to get into a fight with Orlinski, but Orlinski "was out of control, like a beast."

This evidence, if credited by the jury, could support the claim that appellant, either reasonably or unreasonably, believed he was in imminent danger and ultimately acted to

defend himself.[1] But it is inconsistent with the theory that appellant's reasoning was so disturbed by provocation or passion that he acted rashly and without due deliberation and reflection. (*People v. Wickersham* (1982) 32 Cal.3d 307, 326, disapproved on another ground in *People v. Barton* (1995) 12 Cal.4th 186, 200-201.) Defense counsel made a tactical choice to rely on the victim's larger size and physically aggressive behavior to support the theory that appellant acted in self-defense. Counsel's request that the court not instruct on heat of passion allowed the jury to view appellant's actions as reasonable for his safety, rather than as rash, irrational conduct. If there was error resulting from that request, it was invited, and not preserved for appeal.

Appellant claims his trial attorney rendered ineffective assistance by failing to request the sudden quarrel/heat of passion instruction. "To establish constitutionally inadequate representation, a defendant must establish that (1) counsel's representation was deficient, i.e., fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's representation subjected the defendant to prejudice, i.e., a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant." (*People v. Horton* (1995) 11 Cal.4th 1068, 1122.)

As we have explained, defense counsel made a reasonable tactical decision not to rely on heat of passion as a defense. There was virtually no evidence that would have supported this defense, and appellant's testimony was notably inconsistent with that theory. On this record, we conclude counsel was not deficient in failing to request the heat of passion instruction.

II

Appellant argues the trial court erred in failing to instruct the jury that attempted murder requires a specific intent to kill, or that appellant must have acted with express malice to be guilty of attempted murder.

The court instructed the jury in terms of CALCRIM No. 252, which explains that certain of the charged crimes, including attempted murder, require a specific intent or

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[1] The prosecution evidence, which the jury apparently credited, was less favorable to appellant.

mental state. The instruction further states: "To be guilty of these offenses, a person must not only intentionally commit the prohibited act, but must do so with a specific intent or mental state. The act and the intent or mental state required are explained in the instruction for each crime." This instruction alerted the jury to the need to consider appellant's specific intent with respect to the charge of attempted murder.

The court then instructed in terms of CALCRIM No. 600, which provides:

"The defendant is charged in Count 1 with attempted murder.

"To prove that the defendant is guilty of attempted murder, the People must prove that:

"1. The defendant took at least one direct but ineffective step toward killing another person;

"AND

"2. The defendant intended to kill that person.

"A direct step requires more than merely planning or preparing to commit murder or obtaining or arranging for something needed to commit murder. A direct step is one that goes beyond planning or preparation and shows that a person is putting his or her plan into action. A direct step indicates a definite and unambiguous intent to kill. It is a direct movement toward the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt.

"A person who attempts to commit murder is guilty of attempted murder even if, after taking a direct step toward killing, he or she abandons further efforts to complete the crime, or his or her attempt fails or is interrupted by someone or something beyond his or her control. On the other hand, if a person freely and voluntarily abandons his or her plans before taking a direct step toward committing the murder, then that person is not guilty of attempted murder."

This instruction explicitly states that to find appellant committed attempted murder, the prosecution must prove that appellant intended to kill. Appellant argues the court also should have instructed in terms of CALJIC No. 8.66, which states that

attempted murder requires proof that "[t]he person committing the act harbored express malice aforethought, namely, a specific intent to kill unlawfully another human being." Intent to kill and express malice are essentially the same. (*People v. Smith* (2005) 37 Cal.4th 733, 739; *People v. Moon* (2005) 37 Cal.4th 1, 29 [intent to kill is functional equivalent of express malice].) The phrase "intent to kill" is more readily understandable than the more technical "express malice." Instructing the jury that the appellant had to act with the specific intent to kill to be guilty of attempted murder was adequate; instructing with the alternative term "express malice" to describe the required specific intent would not have made the concept of intent to kill any clearer for the jury. We find no instructional error.

III

Appellant asserts the court should have sustained objections to the prosecutor's "was he lying" questions during cross-examination of appellant. This occurred on three occasions, addressing instances where appellant's testimony contradicted that of prosecution witnesses. Defense counsel objected in each instance.

The first occurred in response to the testimony of Los Angeles Police Officer Joseph Eubank. Officer Eubank testified that when he responded to the radio call about this disturbance, he asked appellant his name and date of birth. Appellant gave the name Jose Octavio Moncada, with a birthdate of June 21, 1977. Officer Eubank later learned that the information appellant gave him was incorrect.

When appellant was cross-examined, he was asked why he told the police officer his name was Jose Octavio Moncada. Appellant denied saying that, and the prosecutor asked: "So you're indicating the police officer lied in court?" Appellant said the only identification he had in his pocket was his brother's. The prosecutor asked appellant if he had heard the officer testify that appellant told him his name was Jose Octavio Moncada. Appellant admitted he had heard the testimony. The prosecutor again asked, "And are you telling the jury that the police officer was lying?" Appellant said no, he "never said he was lying." He also said he had not told the officer that was his name. The prosecutor then asked if appellant heard the officer testify that appellant gave his date of birth as

June 21, 1977. Appellant said, yes. The prosecutor asked, "So was he lying?" Appellant said, "I guess." Asked again, appellant said, "Yeah."

In *People v. Chatman* (2006) 38 Cal.4th 344, 381-382, the Supreme Court observed that courts from various jurisdictions have treated "were they lying" questions differently. One line of cases concludes these questions are always improper, another concludes they are never improper, and a third line of cases requires a trial court to consider these questions in context. The Supreme Court followed the third line, holding that "courts should carefully scrutinize 'were they lying' questions in context. They should not be permitted when argumentative, or when designed to elicit testimony that is irrelevant or speculative. However, in its discretion, a court may permit such questions if the witness to whom they are addressed has personal knowledge that allows him to provide competent testimony that may legitimately assist the trier of fact in resolving credibility questions." (38 Cal.4th at p. 384; see also *People v. Hawthorne* (2009) 46 Cal.4th 67, 97.)

In this case, the questions were based on the conflict between appellant's testimony and the testimony of the other witnesses. Appellant had personal knowledge of the events about which he was asked, and could potentially provide insight on whether the witnesses whose testimony differed from his were lying, or were mistaken. When questioned about Officer Eubank's testimony that appellant gave an incorrect name and birthdate, appellant said he never gave the officer the incorrect name, but explained that he had his brother's identification in his pocket. "A party who testifies to a set of facts contrary to the testimony of others may be asked to clarify what his position is and give, if he is able, a reason for the jury to accept his testimony as more reliable." (*People v. Chatman*, *supra*, 38 Cal.4th at p. 382.) Appellant did so in this instance.

The second instance followed appellant's testimony that he never pointed his knife at Orlinski, never walked toward Orlinski, and Orlinski did not back up from appellant. Appellant was asked on cross-examination whether he heard the four witnesses testify that appellant walked towards Orlinski as Orlinski backed up. Appellant replied, "That's what they said." The prosecutor asked, "And are you saying that all those four people

were lying?" Appellant replied, "I mean, I don't know how will you say that when he's approaching me and I'm just swinging at him."

The third instance involved appellant's testimony that he never demanded money from Orlinski. The prosecutor asked, "So those witnesses that testified to that, were they also lying?" Appellant said, "Yes."

In each of these instances, appellant had personal knowledge of his conduct during the incident, and had the opportunity to explain the discrepancy between his version and the testimony of these other witnesses. Unlike the situation in *People v. Zambrano* (2004) 124 Cal.App.4th 228, the prosecutor in this case asked only a few of these questions to clarify appellant's position. The questions were not argumentative; the prosecutor did not "repeatedly and painstakingly" ask appellant if the other witnesses were lying about every aspect of their testimony, and did not use the questions to berate appellant before the jury. (See *Zambrano, supra*, 124 Cal.App.4th at pp. 242-243.)

Considering the questions in context, we conclude the trial court did not abuse its discretion in permitting these questions, nor did they constitute prosecutorial misconduct.

DISPOSITION

The judgment is affirmed.

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EPSTEIN, P.J.

We concur:

MANELLA, J. SUZUKAWA, J.